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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Application of  
RAINBOW BROADCASTING, LTD.  
For modification of  
Construction Permit for  
Station WRBW(TV)  
Orlando, Florida

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File No. BMPCT-931213KE

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To: The Commission

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RAINBOW OPPOSITION TO PRESS APPLICATION FOR REVIEW

Rainbow Broadcasting, Ltd. hereby opposes an application for review filed by Press Broadcasting Company, Inc. on July 5, 1994.<sup>1/</sup> Press seeks review of a June 2, 1994 ruling of Barbara A. Kreisman, Chief Video Services Division (1800EI-AL), granting Rainbow's application for modification of construction permit to specify a different antenna from that proposed in its 1985 application.

Press complains that while the ruling found and admonished Rainbow for a violation of Rule 73.1690(b)(1), it failed to impose a "meaningful sanction" for installation of the new antenna before its approval. Press now seeks assessment of a "substantial" forfeiture.

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1/ In rechecking the due date for this response, counsel for Rainbow realized on July 25, 1994 that a three day mailing period does not apply and the pleading should accordingly have been filed on July 21, 1994. Rainbow requests that the pleading be considered despite its untimeliness; counsel for Press has consented.

In one respect Press is correct: the facts are simple. In 1985, Rainbow's construction permit application proposed a directional antenna of a particular make. By 1993, when construction was undertaken, Rainbow decided to specify a newer and more efficient antenna with virtually the same radiation pattern. To effect the change, Rainbow filed a Form 301 application (BMPCT-931213KE). No action was taken on that application for modification until June 2, 1994, due largely to Press' efforts to have the Commission revoke Rainbow's construction permit. See *Memorandum Opinion and Order*, FCC 94-122, released May 23, 1994.

In the meantime, pursuant to July 30, 1993 authorization from the Chief, Mass Media Bureau (1800EI-PRG), Rainbow proceeded with construction of the station. On the advice of its consulting engineer and the engineer for the landlord of the Bithlo tower, Rainbow understood that it could install the antenna for which a modification request was pending but that it could not turn it on until Commission approval was received. See Sworn Statement of Joseph Rey, appended hereto.

Rainbow's sole alleged transgression is that while its antenna modification application was pending, it installed but did not operate a directional antenna of a

different model from that proposed in its construction permit. Rainbow does not believe that this installation pursuant to an otherwise valid construction permit constituted a violation of Section 319 of the Act or the Commission's Rules. As the Commission observed in *MCI Telecommunications Corp.*, 64 R.R.2d 672 (1988), one of the precedents relied upon by Press, the Section 319(a) prohibition against premature construction is not absolute and "must be read in conjunction with our companion statutory responsibility to provide prompt institution of service to the public. *Patton Communications Corp.*, 81 F.C.C.2d 336, 338 (1980)."

To hold Rainbow's installation of its antenna violative of the Act or the Rules would truly elevate form over substance. Rainbow's construction was not even arguably premature in any respect other than inclusion of the new antenna, which had virtually identical radiation characteristics to the antenna it replaced and which was not operated. Rule 73.1690(b)(1) does not require the interpretation adopted (but not explained) by the Video Services Division; it merely says that "[a]ny change in the location, overall height of antenna structure, or directional radiation characteristics" may be made "only upon specific authority of the FCC."

Even assuming Rainbow's pre-approval installation of its antenna may reasonably be deemed a violation of the Rule, there is no precedent supporting Press' assertion that Rainbow should be assessed a forfeiture of at least \$10,000. In *Bee Broadcasting Associates*, 3 F.C.C. Rcd. 4323, 4329 (MMB), *reversed on other grounds*, 5 F.C.C. Rcd. 6584 (1988), identified by the Bureau as the only published case involving a violation of this section, the broadcaster installed and operated its antenna without even filing a modification application, but was assessed no forfeiture. Press contends (at pages 5-6) that such conduct was "far less egregious" than Rainbow's mere construction because filing of a request for approval proves that Rainbow knew construction was unlawful and wilfully violated the Rule. This imaginative advocacy overlooks the fact that Rainbow knew it could not operate the new antenna absent approval and it did not do so; however, as noted earlier, it was affirmatively counseled by three different engineers familiar with such construction that installation was permissible.<sup>2/</sup>

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2/ Press' inconsistent alternative implication (see page 6 and footnote 6) that *Bee* may not be relied upon because it was reversed by the Commission is disingenuous at best: review was not even sought on this ground and the Commission's partial grant of review (*Bee Broadcasting Associates*, 5 F.C.C. Rcd. 6584 (1988)) remanded the case for the wholly unrelated purpose of hearing on a possible unauthorized transfer of control.

With the exception of *Atkins Broadcasting*, 8 F.C.C. Rcd. 674 (1993), all of the "support" cited by Press for imposition of a forfeiture here involves forfeitures imposed upon cellular operators for multiple premature constructions of entire facilities, not a *de minimis* alteration of a single piece of equipment as part of an otherwise authorized construction: In *Virginia RSA 6 Cellular Limited Partnership*, 7 F.C.C. Rcd. 8022 (1992), the cellular operator unlawfully constructed cells at three sites and increased the height of the tower at one location; in *Data Investments, Inc.*, 6 F.C.C. Rcd. 4496 (1991), another cellular operator constructed its facility, relocated its transmitter and lied about it to the Commission; and in *SEG Cellular Limited Partnership*, 7 F.C.C. Rcd. 74 (1992), the operator constructed and operated at two new sites, including one for which authorization had not even been requested.

In *Atkins*, *supra*, Press' only broadcast case other than *Bee*, the permittee constructed and operated a modified facility before grant and then certified to the Commission that it was operating its previously authorized facilities from its previously authorized site. The Commission set the matter for hearing. Only Press' obsessive desire to destroy a competitor could read support

into these precedents for imposition of a forfeiture here. While Rainbow did not appeal the ruling of the Video Services Division that its antenna installation constituted a technical violation of Rule 73.1690(b)(1) because it was not "injured" by that decision, Rainbow does not believe, as earlier noted, that its action may properly be construed as even a technical violation of the Rule.

The stated purpose of that Rule is to prevent broadcasters from changing the radiation patterns of their directional antennas without prior consent. To interpret that prohibition as extending to pre-grant installation of an unoperated antenna which differs only in the name of its manufacturer from one already approved as part of an ongoing authorized construction not only fails to advance the purpose of the Rule but also disservices the "companion statutory obligation" noted in *MCA, supra*, "to provide prompt institution of service to the public."

Under the Bureau's reading of the Rule, a permittee in Rainbow's position must either buy a less desirable antenna simply because it was the best available 10 years earlier or defer station construction until Commission action on the antenna modification. Neither course has any virtue: the public is the ultimate beneficiary of

broadcaster use of the best available equipment; it is also manifestly best served by the earliest inauguration of an authorized service. In this case it was several months from the time Rainbow's antenna was delivered to the time the permittee was fully ready to operate. Had Rainbow awaited the Bureau's May 23, 1994 approval of its December application, it would not yet be on the air.<sup>3/</sup>

Viewing Rainbow's conduct in the context of this case, as MCI instructs, it is both illogical and unjust to hold Rainbow in violation of the Commission's rules even if the only sanction is an "admonishment".<sup>4/</sup> If, as MCI holds, Section 319 of the Act is not itself inflexible, then surely the Rule which implements it may and should be read in light of the circumstances of each case and the potential impact on institution of service. In this case, Rainbow had a valid construction permit, a timely filed application to change its antenna model to a

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3/ It would also have failed to meet the Bureau's overall construction deadline of March 1994, which Rainbow had every reason to fear reflected the last available extension of time, given Press' fierce and active opposition. Obviously, Rainbow had no way of knowing at that time that the Commission would ultimately grant it additional time in the May 23, 1994 *Memorandum Opinion and Order*, FCC 94-122.

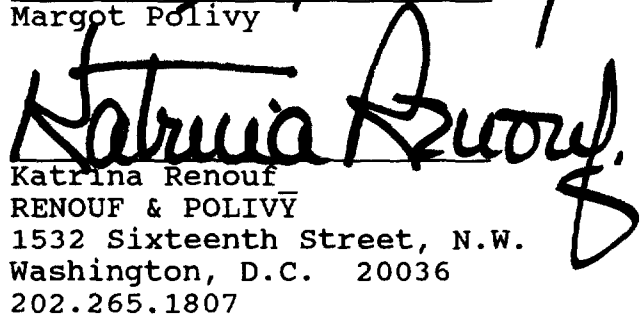
4/ Nor is an admonition necessarily a benign sanction, since it brands the permittee as a wrongdoer and Press has already made clear both its view that two admonitions make a capital crime and its disposition to pursue all available avenues to prevent or terminate Rainbow's operation.

new one with a virtually indistinguishable radiation pattern, and a Commission imposed construction schedule; and it was completely candid about its actions, which all involved understood to be proper. On such facts there can be no reason to find a violation. Nor, in any event, is there either precedent or justification for imposition of a forfeiture.

Respectfully submitted,



Margot Polivy



Katrina Renouf  
RENOUF & POLIVY  
1532 Sixteenth Street, N.W.  
Washington, D.C. 20036  
202.265.1807

Counsel for Rainbow  
Broadcasting, Ltd.

25 July 1994



Sworn Statement of Joseph Rey

I am President of Rainbow Broadcasting Company, Inc., the general partner of Rainbow Broadcasting, Ltd., and General Manager of Station WRBW-TV, Channel 65, Orlando, Florida.

I am familiar with Press Broadcasting's allegations concerning the installation of Channel 65's antenna on January 27, 1994. Prior to installing its antenna, Rainbow took every reasonable step to ensure that its actions were appropriate and that the safety and operation of all concerned, including Press, was safeguarded.

In 1985, Rainbow specified a directional antenna, Andrews ATW 31H3, 15-DSC-65, which was at that time the best available for its purposes. In the 8 years between grant of its construction permit and actual construction, other manufacturers developed similar antenna systems which were both more efficient and less expensive. Because Rainbow was under a short construction schedule from the FCC staff and the manufacturer advised that the antenna order had to be placed 2-3 months in advance, we filed a Form 301 modification request (BMPCF 931213KE) to specify the new antenna model, which had virtually the same radiation pattern as the Andrews originally specified, and ordered the antenna.

Rainbow was advised by its consulting engineer that the type of antenna modification requested was normally acted upon by the FCC staff in approximately 60 days. We were also advised by our engineer that we were permitted to install the antenna prior to action on our pending request but that we could not power it up to permit output testing.

The antenna was scheduled for delivery at the end of January 1994. In accordance with our tower lease, we advised the tower owner of our anticipated schedule. The tower tenants are required, among other things, to reduce or cut off power when necessary for equipment installation and maintenance. It is the tower management which deals with the other tenants in such matters.

Rainbow's antenna installation was finally scheduled for January 27, 1994. The landlord notified Press and sought its cooperation in reducing power to permit the installers access to the tower. Press first indicated

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that it would not cooperate during the February "sweeps" and then refused to reduce power on January 27, claiming the installation was illegal. Richard Edwards, the tower engineer, told me that he had checked with the tower owner's FCC counsel and was advised that the installation was not illegal. The chief of the rigging crew said his company, ESCO Communications, Inc., had checked with the FCC and had been told there was no reason for Press to refuse to reduce power to ensure the safety of the riggers. Nevertheless, Press remained uncooperative.

On January 27, 1994 the riggers were prepared to install the antenna as scheduled and the tower engineer informed us that Channel 18's power had been reduced. The installation was completed that day without further obstruction. The tower engineer inspected the antenna installation and informed me that the antenna was properly installed.

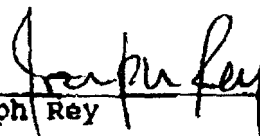
Press' "complaint" was nothing more than another effort to impede Rainbow's construction. Rainbow took every precaution to minimize any inconvenience to Press. We believed that we were acting in accordance with the FCC's rules. Our engineer, the tower's engineer and the rigging company all believed that the installation was proper during the pendency of the modification request. Rainbow understood that it could not power up the antenna or do output equipment tests until the FCC approved the modification request and it did not do so until after the application had been granted.

The foregoing statement is true and correct to the best of my knowledge and belief and is made under penalty of perjury.

Date

7/25/94

Joseph Rey



CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Rainbow Opposition to Press Application for Review were sent first class mail, postage prepaid, this twenty fifth day of July 1994 to the following:

Christopher J. Wright  
Deputy General Counsel  
Federal Communications Commission  
1919 M Street, N.W., Room 614  
Washington, D.C. 20554

Harry F. Cole, Esquire  
Bechtel & Cole, Chartered  
1901 L Street, N.W.  
Suite 250  
Washington, D.C. 20036  
Counsel for Press Television Corporation

  
Katrina Renouf